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No. 04-306

In the Supreme Court of the United States

VENTURE COAL SALES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

RICHARD T. MORRISON
Deputy Assistant Attorney General

THOMAS J. CLARK
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioners filed this suit seeking a refund of excise taxes paid on their coal exports on the ground that exaction of the tax violated the Export Clause of the Constitution. Before petitioners filed suit, a federal district court in another case had declared that the excise tax was unconstitutional as applied to coal exports. The question presented is whether the limitations period for filing petitioners' suit began to run when petitioners paid the tax, or instead did not begin to run (or was tolled) until the federal district court issued its decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3, at 15-29[1]) is reported at 370 F.3d 1102. The opinion of the Court of Federal Claims (Pet. App. 2, at 3-14) is reported at 57 Fed. Cl. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2004. The petition for a writ of certiorari was filed on August 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The Appendix in this petition has no page numbers. For the convenience of the Court we are citing the Appendix as if numbered consecutively 1-29.

STATEMENT

In October 2002, petitioners brought suit in the United States Court of Federal Claims seeking to recover taxes collected by the Internal Revenue Service from 1988 through 1995. The Court of Federal Claims dismissed the complaint on the ground that it had not been filed within the applicable limitations period. The court of appeals affirmed. Pet. App. 2, at 7; Pet. App. 3, at 19-20, 29.

1. Petitioners produce and sell coal subject to the tax imposed by Section 4121 of the Internal Revenue Code of 1986, 26 U.S.C. 4121. Pet. App. 3, at 18. Section 4121 imposes a tax "on coal from mines located in the United States sold by the producer." 26 U.S.C. 4121(a)(1). The statute on its face contains no exemption for exported coal. From the first quarter of 1988 through the second quarter of 1995, petitioners paid the excise tax on their coal exports. Pet. App. 3, at 18.

2. In *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), a number of coal companies, other than petitioners here, successfully sued for a refund of the excise taxes they had paid on exported coal pursuant to 26 U.S.C. 4121. The district court held in that case that the excise tax was unconstitutional as applied to exported coal because it violated the Export Clause, U.S. Const. Art. I, § 9, Cl. 5, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." The government did not appeal from that decision, and the IRS published an acquiescence to it. I.R.S. Notice 2000-28, 2000-1 C.B. 1116.

3. On October 23, 2002,[2] petitioners brought suit in the Court of Federal Claims seeking to recover taxes they paid on their coal exports from the first quarter of 1988 through the second quarter of 1995. Pet. App. 2, at 7; Pet. App. 3, at 18-19. The Court of Federal Claims dismissed the complaint for lack of subject matter jurisdiction, because petitioners' claims were barred by the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. 2, at 3-14. The court explained that petitioners' claims "accrued each time [they] paid tax on coal sold for export," because "the unconstitutionality of the tax was fixed when it was enacted" and thus petitioners' "damages were established when they paid the unconstitutional tax." *Id.* at 9-10. The statute of limitations was not tolled until the *Ranger Fuel* decision because "the courts were completely open to [petitioners] as they were to the plaintiffs in *Ranger Fuel*"—petitioners could not point to any adverse "decision that would have made their cause of action unknowable prior to" the *Ranger Fuel* decision. *Id.* at 12. Moreover, although this Court in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), held that the Due Process Clause requires States to provide "meaningful backward-looking relief" when taxes are found to be unconstitutional, this Court also expressly permitted States to impose on such actions "relatively short statutes of limitations." Pet. App. 2, at 13 (quoting *McKesson*, 496 U.S. at 45).

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[2] The Federal Circuit erroneously stated in its opinion that the complaint was filed in October 2003. Pet. App. 3, at 19. Petitioners' complaint was filed on October 23, 2002. Pet. App. 2, at 7; see Pet. C.A. Br. App. at 12 (No. 03-5132) (note dated stamp). The error is not germane, however, because regardless of whether the suit was filed in 2002 or 2003, it was filed more than six years after the latest taxes at issue were paid.

4. The court of appeals affirmed. Pet. App. 3, at 15-29. The court rejected petitioners' claim that the decision in *Ranger Fuel* served as the "jurisdictional trigger" for petitioners' claims, because that decision "was not the action that damaged [petitioners]." *Id.* at 24. Instead, the court held that petitioners suffered an injury each time they made a payment of tax on their coal exports, and thus a separate claim accrued upon each payment for which they could have sought a refund. *Ibid.* The court also rejected petitioners' argument that they were entitled to relief under this Court's decision in *McKesson*, *supra*. Relying on this Court's statement that a taxing authority "was free to 'impose various procedural requirements on actions for postdeprivation relief,' including the enforcement of 'relatively short statutes of limitation,'" the court of appeals concluded that "[i]n the case before us, enforcement of the six-year limitations period serves as such an appropriate procedural requirement consistent with the *McKesson* holding." Pet. App. 3, at 25-26.

Finally, the court of appeals rejected petitioners' argument "that the statute of limitations should be tolled because [they] did not know nor could [they] have known in the exercise of reasonable diligence that [their] claims had accrued." Pet. App. 3, 27. The court explained that petitioners "had all the facts necessary to initiate a claim against the United States," and were unaware only of "the *legal theory* on which [their] refund claim might succeed." *Id.* at 29. Petitioners were thus not entitled to tolling, because "[i]gnorance of rights which should be known is not enough." *Ibid.* (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners' contention (Pet. 5-8) that their claims did not accrue until *Ranger Fuel* was decided, and thus that their complaint is timely, is meritless. In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that constitutionally-based causes of action seeking recovery of excise taxes paid on exported coal are governed by the six-year limitations period of 28 U.S.C. 2501, rather than the three-year limitations period applicable to administrative refund claims under 26 U.S.C. 6511(a). 205 F.3d at 1372.[3]

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[3] Although we did not challenge the holding of *Cyprus Amax* in our briefs below, the position of the United States is that *Cyprus Amax* was decided incorrectly. When Congress waived the sovereign immunity of the United States and permitted tax-refund suits, it prescribed in great detail a particular track for claimants to follow, in administrative or judicial proceedings. See 26 U.S.C. 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."). *Cyprus Amax* erroneously gave claimants the ability to sue under the Tucker Act and thereby bypass the exclusive refund procedures established by Congress. A broad jurisdictional statute such as the Tucker Act cannot displace the specific provisions of the refund statutes, such as 26 U.S.C. 7422. This issue is jurisdictional, moreover, because it implicates the sovereign immunity

Applying that holding, the court of appeals correctly concluded that petitioners' claims accrued, and thus the statute began to run, each time they paid taxes. A claim accrues "on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Bowen* v. *United States*, 292 F.3d 1383, 1385 (Fed. Cir. 2002) (quoting *Chandler* v. *United States*, 47 Fed. Cl. 106, 113 (2000), aff'd, 7 Fed. Appx. 957 (Fed. Cir. 2001)). As the court explained, "[e]ach time that [petitioners] paid the Coal Sales Tax, the language of the statute and its possible unconstitutional nature were thus fixed, injury was inflicted, and a separate claim accrued." Pet. App. 3, at 24.[4] Thus, petitioners had the same right to file a suit for refund upon payment of the tax as did the coal companies that in fact brought suit in *Ranger Fuel*.

2. Petitioners also err in asserting (Pet. 8-10) that the statute of limitations was tolled until *Ranger Fuel* was decided. Petitioners contend (*ibid.*) that their

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of the United States. This Court has recognized that "[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit," as well as that "one of those terms" is "[a] statute of limitations requiring that a suit against the Government be brought within a certain time period." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990) (internal quotation marks and citations omitted); see, *e.g.*, *United States* v. *Williams*, 514 U.S. 527, 534 n.7 (1995); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).

[4] Indeed, this case is no different from *Hatter* v. *United States*, 203 F.3d 795 (Fed. Cir. 2000), rev'd in part on other grounds, 532 U.S. 557 (2001), in which the court held that a claim accrued each time the United States improperly deducted moneys from judges' pay. See *Catawba Indian Tribe* v. *United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993), cert. denied, 509 U.S. 904 (1993).

claims were "inherently unknowable" prior to that time, but petitioners' mere ignorance of their legal rights is not sufficient to toll the statute of limitations. See *Menominee Tribe of Indians* v. *United States*, 726 F.2d 718, 720-721 (Fed. Cir.) ("28 U.S.C. § 2501 is not tolled by the [plaintiffs'] ignorance of their *legal* rights"), cert. denied, 469 U.S. 826 (1984); *Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967).[5] Consequently, petitioners are not entitled to a tolling of the limitations period.

3. Petitioners err in contending (Pet. 5-10) that the decision below conflicts with *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972), and *Neely* v. *United States*, 546 F.2d 1059 (3d Cir. 1976). Those cases involved the application of this Court's decision in *Marchetti* v. *United States*, 390 U.S. 39 (1968), which had overruled two earlier decisions of the Court.

In *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953), and *Lewis* v. *United States*, 348 U.S. 419, 421-423 (1955), the Court had held that certain wagering tax provisions of the Internal Revenue Code, which required persons engaged in the business of accepting wagers to register with the Internal Revenue Service

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[5] Indeed, the courts of appeals have recognized that even the existence of adverse authority that affects the viability of an unasserted cause of action does not automatically toll the statute of limitations. *Boling* v. *United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000); *Fiesel* v. *Board of Educ.*, 675 F.2d 522, 524-525 (2d Cir. 1982); *Versluis* v. *Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946); see *McConnell* v. *Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) ("A decision recognizing a cause of action after the period has run does not retroactively interrupt the running of the limitations period.").

and to pay an occupational tax, did not violate the Fifth Amendment privilege against self-incrimination. In *Marchetti*, the Court overruled *Kahriger* and *Lewis*, and held that the Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms. 390 U.S. at 54. Three years later, in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), the Court held that *Marchetti* had retroactive effect, and that persons who had been required to forfeit property following their convictions under the statute could recover the property. *Id.* at 722-724.

At issue in both *One 1961 Red Chevrolet* and *Neely* was whether actions by taxpayers to recover property they had forfeited following their convictions for failure to register were barred by the statute of limitations. In *One 1961 Red Chevrolet*, the Fifth Circuit held that the limitations period did not begin to run until *Marchetti* was decided, because until that time the taxpayer "had no reasonable probability of successfully prosecuting his claim." 457 F.2d at 1358. In *Neely*, the Third Circuit held that in light of *Kahriger* and *Lewis*, the taxpayer's claim was "inherently unknowable" until *Marchetti* was decided, and thus the running of the limitations period was suspended until that time. 546 F.2d at 1068.

One 1961 Red Chevrolet and *Neely* are thus far different from the instant case. In those cases, the actions brought by the taxpayers—to recover property they had forfeited following their convictions under a statute held to be unconstitutional in *Marchetti*—were, until *Marchetti*, barred by this Court's decisions in *Kahriger* and *Lewis*. In contrast, no prior decisions of this Court —or of any other court, for that matter—would have barred petitioners from filing a timely suit to recover

the taxes they had paid on their coal exports. Unlike *One 1961 Red Chevrolet* and *Neely*, the legal theory upon which petitioners now seek a refund has never been rejected by any court. The decision below thus does not conflict with *One 1961 Red Chevrolet* or *Neely*.

4. Finally, petitioners' argument (Pet. 10-12) that their petition should be granted so that the Court may elaborate on the "meaningful backward-looking relief" standard it enunciated in *McKesson* is similarly unwarranted. 496 U.S. at 31. In *McKesson*, the Florida Supreme Court had denied a taxpayer any right to a refund of state taxes paid under a statute that the court had declared unconstitutional. *Id.* at 22. This Court reversed, holding that, when taxpayers must pay taxes first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a "meaningful opportunity" to secure postpayment relief for taxes paid under a statute later found to be unconstitutional. *Ibid.* In so holding, however, the Court recognized that, in order to engage in sound fiscal planning, a State is free to impose various procedural requirements on actions for postdeprivation relief, including the enforcement of "relatively short statutes of limitations." *Id.* at 45. The six-year limitations period applied by the courts below (or, for that matter, the three-year limitations period applicable under 26 U.S.C. 6511(a)) plainly satisfies the "meaningful opportunity" requirement. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

RICHARD T. MORRISON
Deputy Assistant Attorney General

THOMAS J. CLARK
Attorney

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